

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
WENDELL L. GRIFFEN, JUDGE

DIVISION II

CA05-1085

April 26 , 2006

RUBY MIZELL  
APPELLANT

AN APPEAL FROM ST. FRANCIS  
COUNTY CIRCUIT COURT  
[No. J2001-66]

V.

HON. GARY M. ARNOLD, JUDGE

ARKANSAS DEPARTMENT  
OF HUMAN SERVICES  
APPELLEE

AFFIRMED

Ruby Mizell appeals from the termination of her parental rights with regard to her three daughters, arguing there was insufficient evidence to support the termination. We hold that the trial court did not err in terminating her parental rights; thus, we affirm the termination order.

Mizell voluntarily surrendered her children to appellee, Arkansas Department of Human Services (ADHS), due to her addiction to crack cocaine. On April 30, 2001, ADHS was granted emergency custody of Mizell's two daughters, who have been in ADHS's custody since that time.

The original goal in the case was reunification. Among other things, Mizell was ordered to complete inpatient drug rehabilitation, to complete parenting classes, and to obtain employment and stable housing. She was allowed weekly supervised visits at ADHS's offices. She visited her children until July 2001, at which time she stopped visiting them. Mizell did not contact ADHS between July 2001 and December 2001, except for one time in the latter

part of 2001, when she came to ADHS's office because she heard a false rumor that one of her daughters had been struck by a vehicle. After a hearing in December 2001, the trial judge suspended Mizell's visitation privileges until she again contacted ADHS.

Meanwhile, sometime in 2001, Mizell began living "off and on" in a separate residence on the property of John Jaggars, a licensed psychological examiner, who, unknown to the trial court and ADHS, was granted guardianship of Mizell in October 2002, due to her drug addiction. Jaggars attended the July 21, 2003 permanency-planning hearing. Because the court and ADHS had been unaware of Mizell's guardianship, it rescheduled the termination hearing and ordered ADHS to serve Jaggars with notice of the termination proceedings within 120 days. For reasons not made clear in the record, the agency did not serve Jaggars until March 14, 2004, well beyond the 120-day period. Nonetheless, in her response to the petition, filed on March 17, 2004, Mizell did not assert the defense of insufficient process. In the interim, on February 8, 2004, Jaggars filed a petition for guardianship of Mizell's daughters. The termination hearing was not held until August 10, 2004.

Mizell appeared at the August 10 hearing and testified that she had lived on Jaggars's property "off and on" since 2001. She admitted that she had been addicted to crack cocaine, but asserted that she had been "clean" for six months. Mizell testified that she had completed a thirty-one day inpatient drug-rehabilitation program but had no certificate to verify that she completed the program. She also admitted that she had "messed up a couple of times" since being released from that program. She indicated that she was willing to take a drug test and that she was "confident" she would pass a drug test.

Mizell stated that she worked for Jaggars in his office and that he was her "sole" source of income. She admitted that she made only one child support payment of \$35. She claimed that she had gone to ADHS several times with Jaggars since completing drug rehabilitation but that she stayed in the vehicle because it was "too stressful." The evidence established that

she and Jaggars met with ADHS the month before the termination hearing in an apparent attempt to request parenting classes.

Jaggars testified that Mizell asked him in June 2001 to work with her to resolve her drug problem and he agreed, knowing that she had three children in foster care. He corroborated her testimony that she completed a thirty-one day drug-rehabilitation program. Jaggars testified that he became Mizell's guardian in October 2002 due to her drug addiction and that he remained her guardian. He admitted that Mizell was not "ready to receive" her children but stated that she was making great progress. He expected her to recover in "another year or two" and indicated that he would support her until she fully recovered. Even though Jaggars indicated at the July 2003 hearing that he favored having the children placed with a Ms. Golden, who had custody of Mizell's daughters' half-siblings, at the August 2004 hearing, he proposed that the children stay with him and his wife and then be "re-integrated" into Mizell's care.

Jaggars claimed that he was unaware of the termination petition until July 2003 and that he was never served with notice of a hearing. He maintained that, following the July 2003 hearing, he attempted to contact ADHS several times but was told not to come back to their offices and was even made to leave the building on one occasion. This testimony was contradicted by ADHS's witnesses.

Various employees for ADHS additionally testified, establishing Mizell's general failure to comply with the case plan. The supervisor for the foster-care program disputed Mizell's assertion that Mizell had completed a drug program; she testified that Mizell went to an in-patient facility but left the program to be with her children. The collective testimony of ADHS's witnesses established that Mizell never provided written proof that she completed a drug program; that she had not demonstrated the ability to maintain a job and provide a residence for herself or her children; that she failed to visit ADHS weekly as ordered; that she

failed to complete parenting classes; and that she failed to visit her children and pay child support. Further, the testimony of the adoption specialist and the counselor established that the three girls should be kept together, that they were well-adjusted with their foster family, that their foster family wished to adopt them, and that they were adoptable.

On March 9, 2005, the court granted the termination petition and found that Jaggars' petition for guardianship of Mizell's daughters was an attempt to circumvent the termination petition. The court noted that the overriding consideration was the "permanency of the children" and that it was in their best interests that Mizell's rights be terminated. In its subsequent written order, the court noted that the girls had been out of Mizell's custody for over three years, and further noted that, by Mizell's own testimony, she was unable to care for her children when she surrendered them to ADHS and she remained unable to care for them. The court also noted that Mizell had been adjudged to be incompetent in October 2002 and remained incapacitated primarily due to her drug addiction.

In addition, the court cited the fact that Mizell ceased visiting her children in July 2001; did not avail herself of the services offered by ADHS; failed to keep ADHS informed of her current address; failed to provide proof of income; and remained unemployed. Further noting that Jaggars admitted that it would be another year or two before Mizell regains her competence, the court concluded that, from the children's perspective, custody cannot be returned to Mizell within a reasonable period of time. The court also found that, despite a meaningful effort by ADHS, Mizell had failed to remedy the conditions that necessitated removal of the children.

Finally, the court noted that the children were thriving, had completed their treatment goals (having completed and been removed from counseling), and that removal from their current placement would be detrimental to their health and well being. Noting that their adoption is "assured," the court found that it was in the children's best interests that Mizell's

parental rights be terminated.<sup>1</sup>

### *I. Lack of Notice*

We first address Mizell's argument that her right to due process has been violated because she did not receive notice of the original termination hearing that was held in July 2003. However, because her argument is not preserved for appeal, we do not address it on the merits.

The defense of insufficiency of service of process is an affirmative defense that is waived if it is not asserted in the original responsive pleading or by way of a motion. Ark. R. Civ. P. 12(h)(1); *Lawson v. Edmondson*, 302 Ark. 46, 786 S.W.2d 823 (1990); *Dunklin v. First Magnus Fin. Corp.*, 79 Ark. App. 246, 86 S.W.3d 22 (2002). Jaggars testified that he was never served as Mizell's guardian, and the trial court agreed. The court delayed the termination hearing and ordered ADHS to serve Jaggars within 120 days. Although ADHS served Jaggars, it did not do so within 120 days. Nevertheless, neither Jaggars nor Mizell raised the defense of lack of service in the first responsive pleading filed by Mizell, which was not filed until March 17, 2004. Nor was the defense thereafter raised by a motion for dismissal.

Clearly, by the time Mizell's March 17, 2004 pleading was filed and the August 2004 hearing was held, Mizell had notice that ADHS and the trial court were unaware until July 2003 that Jaggars had been appointed as her guardian and that termination proceedings had been filed against her. Yet, she asserted no lack of service-of-process defense in her first responsive pleading. Accordingly, she has waived her due-process argument concerning lack of notice.

### *II. Sufficiency of the Evidence*

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<sup>1</sup>The parental rights of the girls' father were also terminated by this order, but that is not the subject of this appeal.

The remaining issue is whether the trial court erred in terminating Mizell's parental rights. The standard of review for a case in which a party's parental rights have been terminated is well settled. An order forever terminating parental rights must be based upon clear and convincing evidence that the termination is in the best interests of the child, taking into consideration the likelihood that the child will be adopted and the potential harm caused by continuing contact with the parent. *Johnson v. Arkansas Dep't of Human Servs.*, 78 Ark. App. 112, 82 S.W.3d 183 (2002). Clear and convincing evidence is that degree of proof which will produce in the fact finder a firm conviction regarding the allegation sought to be established; where facts must be proven by clear and convincing evidence, the issue for the appellate court is whether the findings were clearly erroneous. *Id.* In reviewing a termination order, we must give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Id.* Additionally, we have noted that in matters involving the welfare of young children, we will give great weight to the trial judge's personal observations. *Id.*

When the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party to terminate the relationship. *Id.* Termination of parental rights is an extreme remedy and is in derogation of the natural rights of the parents. However, parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Id.*

The statute authorizing the termination of parental rights, Arkansas Code Annotated § 9-27-341 (Supp. 2005), states:

(b)(1)(A) The circuit court may consider a petition to terminate parental rights if the court finds that there is an appropriate permanency placement plan for the juvenile.

...

(3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:

(A) That it is in the best interest of the juvenile, including consideration of the following factors:

(i) The likelihood that the juvenile will be adopted if the termination petition is granted; and

(ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by continuing contact with the parent, parents, or putative parent or parents, and

(B) Of one (1) or more of the following grounds:

(i)(a) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.

...

(vii)(a) That other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent return of the juvenile to the custody of the parent.

We affirm the termination order because the trial court correctly found that there was clear and convincing evidence that each of these statutory elements had been met. First, the children were neglected due to Mizell's drug addiction, and at the time of the hearing, had been outside of the home for over three years, well in excess of the requisite twelve-month statutory period. Mizell had been sober for six months as of the date of the termination hearing in August 2004. However, even if she had no notice of the termination proceedings until July 2003, she continued to use drugs for six months thereafter, with full knowledge that termination proceedings had been initiated against her. Last minute effort on the part of a parent to comply with a case plan is an insufficient reason to not terminate parental rights. Ark. Code Ann. § 9-27-341(a)(4)(A); *Trout v. Arkansas Dep't of Human Servs.*, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Nov. 4, 2004).

Further, Mizell has clearly failed to remedy the conditions that caused the children's removal and has manifested the incapacity or indifference to do so. Her argument that she did not receive notice of the hearings belies the undisputed facts that she did not provide proof that she completed drug rehabilitation; that she had virtually no contact with ADHS from July 1, 2001, until July 2003; that she stopped visiting her children in July 2001; and that she did not

complete any of the goals of her case plan. Again, her request for parenting classes, if made the month before the second termination hearing, was too little, too late. Ark. Code Ann. § 9-27-341(a)(4)(A); *Trout, supra*.

Thus, as the time of the hearing, Mizell's daughters, who were ages seven, nine, and ten, respectively, had been out of her custody for over three years. They had adjusted so well to their foster family that they no longer required counseling. We agree with the trial court's determination that Mizell's daughters should not be forced to wait another one or two years for Mizell to make a complete recovery. Therefore, we affirm the order terminating Mizell's parental rights.

Affirmed.

PITTMAN, C.J., and ROAF, J., agree.